

HON. JUSTIN L. QUACKENBUSH

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

MICHAEL KIRBY,

Plaintiff,

v.

CITY OF EAST WENATCHEE, and  
OFFICER JAMES MARSHALL,

Defendants.

NO. CV 12-190-JLQ

**DEFENDANTS' MEMO IN  
SUPPORT OF MOTION FOR  
PROTECTIVE ORDER RE  
DEFENDANT OFFICER  
MARSHALL'S PRE-  
EMPLOYMENT  
PSYCHOLOGICAL  
ASSESSMENTS AND POLYGRAPH  
EXAMS**

Hearing date: July 30, 2012  
6:30 pm

**WITHOUT ORAL ARGUMENT**

**I. INTRODUCTION**

This is a § 1983 lawsuit alleging that defendant Officer James Marshall used excessive force against plaintiff when he was standing on his front porch with a long firearm. This motion involves whether plaintiff is entitled to defendant Officer Marshall's pre-employment psychological assessments and reports of

1 polygraphs. This motion is intended to apply to all past and present police  
2 positions of defendant Officer Marshall. Defendants contend that if the court  
3 reviews the requested material, the court will find that the items are not reasonably  
4 calculated to lead to the discovery of admissible evidence. Defendants further  
5 contend that disclosing the material violates defendant Officer Marshall's privacy  
6 rights. Defendants further contend that the requested material should be exempt  
7 under FRCP 26(c)(1)("annoyance, embarrassment, oppression") and that the  
8 requested material is privileged.  
9

10 During discovery, defendants produced defendant Officer Marshall's  
11 personnel file and training records. (Defendants' first supplement to defendants'  
12 initial disclosures dated June 7, 2012.) Contained in defendant Officer Marshall's  
13 personnel file was a pre-employment psychological assessment dated April 28,  
14 2008 by Thomas Rowe, Ph.D., Wenatchee, and a pre-employment polygraph  
15 report dated April 29, 2008 by Sgt. Ken Britt of the Wenatchee Police Department.  
16 Defendants did not produce the two items. Instead, defendants stated: "Not  
17 produced; privileged and right of privacy." To this objection, defendants also add:  
18 "Not reasonably calculated to lead to the discovery of admissible evidence, and  
19 exempt from discovery under Fed.R.Civ.P. 26(c)."  
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22 By letter dated June 18, 2012, counsel for plaintiff stated in part:  
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1 (1) Provide the complete polygraph examination records for  
2 Officer Marshall. The “complete polygraph examination” includes:  
3 polygraph results, polygraph charts, pre-interview notes, pre-  
polygraph test questions and results, and the name of the examiner.

4 (2) Provide the complete psychological testing records for Officer  
5 Marshall. The “complete psychological testing records” includes: any  
6 testing questions, any notes taken during the evaluation, the name of  
the evaluator, and any reports issued as a result of the evaluation.

7 . . . We will also be filing a subpoena duces tecum in the next several  
8 days requesting Officer Marshall’s full employment file from the  
Medina Police Department.

9 Defendants do not have a copy of defendant Officer Marshall’s personnel  
10 file from the Medina Police Department, where he worked from April 2007 until  
11 he was hired by the East Wenatchee Police Department in 2008. Defendants are in  
12 the process of obtaining the file so that it may be produced to the court for *in*  
13 *camera* inspection. Additionally, defendants also do not have a copy of defendant  
14 Officer Marshall’s personnel file from the City of Clyde Hill Police Department,  
15 where he worked from September 2003 to April 2007.  
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## 17 II. APPLICABLE COURT RULE

18 Fed.R.Civ.P. 26(c) provides: “A party . . . from whom discovery is sought  
19 may move for a protective order in the court where the action is pending . . . . The  
20 court may, for good cause, enter an order to protect a party or person from  
21 annoyance, embarrassment, oppression, or undue burden or expense, including one  
22 of more of the following: (A) forbidding the disclosure or discovery . . . .”  
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### III. ARGUMENT

**A. AFTER THE COURT PERFORMS AN *IN CAMERA* REVIEW OF THE PRE-EMPLOYMENT MATERIAL, THE COURT SHOULD ENTER A PROTECTIVE ORDER STATING THAT DEFENDANTS DO NOT HAVE TO PRODUCE THE REQUESTED MATERIAL.**

**1. Pre-employment psychological assessments and polygraph examinations are performed for prospective police officer pursuant to a state statute.**

For most prospective employees of private employers, it is unlawful to condition employment upon a pre-employment polygraph examination. See RCW 49.44.120(1) (requiring lie detector tests – penalty) and 29 U.S.C. § 2001 et seq. (Employee Polygraph Protection Act; the “EPPA”). Thus, the state and the federal government have recognized the substantial privacy issue involved with a prospective employee’s polygraph examination.

RCW 49.44.102(1) “shall not apply to persons making application for employment with any law enforcement agency . . . .” RCW 43.101.080(19) provides that the Washington State Criminal Justice Training Commission has the power to require prospective police officers to undergo psychological assessments and polygraph examinations. RCW 43.101.095 (peace officer certification) sets forth who is qualified to perform a police psychological assessment and a police polygraph exam.

1           **2. The court should order that defendant Officer Marshall’s pre-**  
2           **employment psychological assessment and polygraph exam is**  
3           **protected from disclosure in this lawsuit.**

4           The court has great discretion to issue protective orders denying discovery.  
5           B.R.S.Land Investors v. United States, 596 F.2d 353, 356 (9<sup>th</sup> Cir. 1979). Under  
6           Rule 26(b)(1), discoverable material is “any nonprivileged matter that is relevant to  
7           any party’s claim or defense” and “[r]elevant information need not be admissible at  
8           the trial if the discovery appears reasonably calculated to lead to the discovery of  
9           admissible evidence.” If the court performs an *in camera* review of the contents of  
10          the psychological assessment and the polygraph exam report, ***the court will most***  
11          ***probably find that the requested material is not reasonably calculated to lead to***  
12          ***the discovery of admissible evidence.*** Moreover, if the court reviews the requested  
13          information, it is likely that the court will conclude that disclosure of the material  
14          would unduly subject defendant officer to annoyance, embarrassment and  
15          oppression.  
16

17          *Dr. Rowe’s psychological assessment* – Dr. Rowe prepared a four-page  
18          assessment. The report contains the following sections: (a) *Reason for referral*  
19          (this section stated that the assessment was part of an overall screening process for  
20          applicants for patrol officer), (b) *Background information* (this section includes  
21          information on the medical condition of defendant Officer Marshall’s mother  
22          together with defendant Officer Marshall’s family situation while growing up with  
23          together with defendant Officer Marshall’s family situation while growing up with  
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1 his parents and his two siblings. This section also includes information on  
2 defendant Officer Marshall's health, habits, hobbies and previous occupations,  
3 together with information on his relationship with his significant other and his  
4 other friends), (c) *Tests administered* (this section details defendant Officer  
5 Marshall's test results on the MMPI and the Wonderlic Personnel Test), and (d)  
6 *Summary and conclusions* (this section sets forth Dr. Rowe's opinion about  
7 defendant Officer Marshall's suitability for the position of police patrol officer and  
8 Dr. Rowe's recommendation of defendant Officer Marshall for the position).

10 *Sgt. Britt's polygraph report* – Sgt. Britt prepared a 1-1/4 page report. The  
11 report stated that questions were asked of defendant Officer Marshall including: (a)  
12 whether he was ever suspended from school or college, (b) whether his driver's  
13 license was ever suspended or revoked, (c) the number of any traffic citations that  
14 he has received, (d) whether he had any traffic citations during the past three years,  
15 (e) whether he ever used or sold drugs, (f) whether he has ever had a problem with  
16 the use of alcohol, and (g) questions about his sexual history including questions  
17 about any child sexual abuse or child internet porn.

19 “In civil rights cases brought under federal statutes, questions of privilege  
20 are resolved by federal law.” Hampton v. City of San Diego, 147 F.R.D. 227, 228,  
21 230 (S.D.Cal. 1993). Federal common law recognizes a qualified privilege for  
22 official information, such as information in government personnel files. Kerr v.

1 U.S. District Court, 511 F.2d 192, 197-98 (9<sup>th</sup> Cir. 1975). To determine whether  
2 information in government personnel files is subject to the official information  
3 privilege, federal courts weigh the potential benefits of disclosure against the  
4 potential disadvantages. Sanchez v. City of Santa Ana, 936 F.3d 1027, 1033-34  
5 (9<sup>th</sup> Cir. 1990).

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7 Before courts engage in this balancing, the party asserting the privilege must  
8 make a “substantial threshold showing.” Soto v. City of Concord, 162 F.R.D. 603,  
9 613 (N.D.Cal. 1995). “If a defendant meets the threshold requirements, the court  
10 will order an *in camera* review of the material and balance each party’s interests.”  
11 Id. at 613.

12  
13 The substantial threshold showing should be deemed to be met due to the  
14 privacy interests involved in the material that is sought. Defendant officer  
15 underwent the assessments and exams solely for the purpose of determining  
16 whether he would be a suitable police officer – not because there was any  
17 suspicion that he was psychologically imbalanced or an anti-social person. For  
18 example, the polygraph report stated at the beginning of the report that it was  
19 “**CONFIDENTIAL**” and “**FOR THE EXCLUSIVE USE**” of specified law  
20 enforcement personnel.  
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1 In Hallon v. City of Stockton, 2012 WL 394200 (E.D.Cal. 2012), the court  
2 did not allow plaintiff to obtain defendant officers' complete employee files in a §  
3 1983 action. The court stated at \*5: "Defendants shall further turn over those  
4 portions of the personnel files relating to training regarding the use of force.  
5 Plaintiff's request is denied in all other respects."

6  
7 In Holmes v. Henry, 2011 WL 5075012 (E.D.Ark. 2011), plaintiff filed a §  
8 1983 lawsuit for alleged wrongful arrest in violation of her constitutional rights.  
9 Plaintiff sought the personnel files of defendant officers and any police officer that  
10 defendants intended to call as a witness. In granting defendant's motion for a  
11 protective order, the court stated at \*3:

12  
13 The Court finds that the confidential nature of information contained  
14 in a police officer's personnel file constitute good cause for granting  
15 the requested protective order. See Donald v. Rast, 927 F.2d 379, 381  
(8<sup>th</sup> Cir. 1991)(noting confidential nature of a police officer's  
16 personnel file).

17 In Snowten v. City of San Diego, plaintiff brought a § 1983 lawsuit due to  
18 alleged excessive force. Defendant police officer brought a motion for a protective  
19 order as to his personnel file and other material. The court performed *in camera*  
20 review of the documents listed in defendant officer's privilege log. The court set  
21 forth the legal standard at \*2 (emphasis added):

22 Federal common law recognizes a qualified privilege for  
23 official information. [Citations omitted.] Government  
24 personnel files are considered official information. [Citation



1 omitted.] In determining what level of protection to afford the  
2 official information privilege, courts balance the interests of the  
3 party seeking discovery against the interests of the  
4 governmental entity asserting the privilege. [Citation omitted.]  
5 *The party requesting the information must describe how the*  
6 *information is “reasonably calculated to lead to the discovery*  
7 *of admissible evidence, identifying interests . . . that would be*  
8 *harmful if the material were not disclosed, and specifying how*  
9 *the harm would occur and how extensive it would be.”*  
10 [Citation omitted.] The courts must weigh the potential benefits  
11 of disclosure against the potential disadvantages. If the latter is  
12 greater, the privilege bars discovery. . . .

13 On the basis of the court’s *in camera* review of documents, the court  
14 concluded that many of the sought documents were “confidential and for attorney  
15 eyes only.” The court then ordered the parties to meet and confer and to file a joint  
16 protective order. *Id.* at 3. There was no indication that the personnel file included  
17 psychological assessments or polygraph reports. Items that the court in *Snowden*  
18 designated “confidential and for attorney eyes only” have already been produced  
19 by defendants in the case at bar. The psychological assessments and polygraphs  
20 are of such a confidential nature that the court in this lawsuit should grant a full  
21 protective order as to those items.

22 **B. IF THE COURT ORDERS PRODUCTION OF THE REQUESTED**  
23 **MATERIAL, THEN THE COURT SHOULD ENTER A**  
24 **CONFIDENTIALITY ORDER.**

In *Morrissey v. City of New York*, 171 F.R.D. 85 (S.D.N.Y. 1997), after  
performing an *in camera* review, the court entered a protective order stating that

1 defendant police officer was not required to produce a credit report contained in his  
2 personnel file in connection with a § 1983 lawsuit for the alleged wrongful  
3 shooting of another police officer. (The opinion did not state that pre-employment  
4 psychological assessments or polygraph exams were contained in the personnel  
5 file.) As to other information contained in defendant's personnel file, the court  
6 entered an order "requiring plaintiff not to publicly disclose any of the information  
7 . . . and to use this information only for the purposes of this litigation." Id. at 93.

8  
9 See also Snowten v. City of San Diego, supra.

10 If the court determines that defendant Officer Marshall's psychological and  
11 polygraph material must be produced to plaintiff, then the court should enter a  
12 similar order.

## 13 14 V. CONCLUSION

15 The court should perform an *in camera* review of the material sought to be  
16 withheld. After the *in camera* review, the court should enter a protective order  
17 preventing the disclosure of the specified material.

18 RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of June, 2012.

19  
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